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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

ELLEN BAKER, Plaintiff and Appellant, v. PNC BANK MORTGAGE ET AL., Defendants and Respondents.	A152888 (Alameda County Super. Ct. No. RG16804805)

Plaintiff Ellen Baker defaulted on her home mortgage, nonjudicial foreclosure proceedings were initiated, and her house was sold at auction. Baker then brought this action against defendants PNC Bank Mortgage (PNC)—the loan servicer—and Duke Partners, LLC (Duke)—the purchaser of her house—alleging various causes of action arising from the foreclosure.[1] The trial court granted summary judgment in PNC's favor, and after a bench trial on the remaining claims against Duke, it entered judgment in Duke's favor as well. We reject Baker's challenges to both judgments and affirm.

I.
FACTUAL AND PROCEDURAL BACKGROUND

In December 2006, Baker obtained a $417,000 loan secured by a deed of trust recorded against her property in Berkeley. The deed of trust identifies National City

[1] The operative complaint also identifies Quality Loan Service Corporation (QLS) as a defendant, but it is not a party to this appeal.

Mortgage, a division of National City Bank (NCB), as the lender and beneficiary and NCB as the trustee.

In January 2007, National City Mortgage assigned the loan to National City Mortgage Co. (NCMC), a subsidiary of NCB. Later that month, NCMC sold the loan to the Federal National Mortgage Association (Fannie Mae) while retaining the rights to service it. By late 2009, through a series of mergers, NCMC became known as PNC and continued as servicer of Baker's loan under that name.

In May 2014, PNC Bank, National Association (PNC Bank), into which NCB had merged and of which PNC is a division, executed a substitution of trustee naming QLS as the trustee. The substitution was recorded on June 16 of that year. Three days later, QLS recorded a notice of default claiming that Baker was in arrears on her loan in the amount of $25,599.14. Approximately 18 months later, in January 2016, QLS recorded a notice of trustee's sale. At the sale the following month, Duke bought the property for $681,000.

Baker filed this lawsuit within days of the property's sale. The operative complaint states causes of action for violation of the Homeowner Bill of Rights (HBOR), negligence, unfair business practices, and wrongful foreclosure against PNC, and cancellation of instruments, declaratory relief, and quiet title against both PNC and Duke.

In September 2017, the trial court granted PNC's motion for summary judgment and Duke's motion for summary adjudication of the claim for quiet title. The record does not indicate, however, that PNC prepared a judgment or that a judgment in its favor was ever entered. The following month, after the court held a bench trial on the remaining two claims against Duke, it entered judgment in Duke's favor. Baker's notice of appeal identifies the appeal as from a judgment after an order granting summary judgment and a judgment after trial.

II.
DISCUSSION

A. We May Consider the Claims Involving PNC Even Though a Judgment in Its Favor Was Never Entered.

Initially, we observe that a judgment in PNC's favor was apparently never entered, an issue the parties do not address. Our record contains only the trial court's September 15, 2017 order granting summary judgment to PNC. PNC does not seek to dismiss the appeal on this basis, however, and it will not be prejudiced if we resolve the case on the merits. "Under these circumstances, '[to] dismiss the appeal "merely to have a judgment formally entered below with a new appeal would be a useless waste of judicial and litigant time." ' " (*Donohue v. State of California* (1986) 178 Cal.App.3d 795, 800.) Therefore, because the trial court "clearly intended to finally dispose of [Baker's] complaint against [PNC], we can amend the order to make it an effective judgment." (*Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App.4th 1, 6.) We direct the court to enter a judgment in favor of PNC nunc pro tunc as of the date of the order granting summary judgment, "and we then construe the notice of appeal to refer to such judgment."[2] (*Donohue*, at p. 800.)

B. The Trial Court Properly Granted Summary Judgment to PNC.

Baker contends that the trial court erred by granting summary judgment on her causes of action against PNC. We disagree.

1. Standard of review.

We begin with the familiar standards governing summary judgment. Summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) To meet its initial burden in moving for summary judgment, a defendant must "demonstrat[e] that one or more elements of the

[2] In doing so, we note that Baker's November 3, 2017 appeal from this judgment is still timely. (Cf. *Davis v. Superior Court* (2011) 196 Cal.App.4th 669, 674 [declining to construe order granting summary judgment as final judgment where doing so would "extinguish[] the right to appeal"].)

plaintiff's cause of action cannot be established or that there is a complete defense to the action. [Citations.] Once the defendant makes this showing, the burden shifts to the plaintiff to show that a triable issue of material fact exists with regard to that cause of action or defense." (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 100.)

"In evaluating a grant of summary judgment, we review the record de novo, 'liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party.' " (*Abed v. Western Dental Services, Inc.* (2018) 23 Cal.App.5th 726, 738.) We "consider[] all the evidence set forth in the moving and opposition papers, except that to which objections have been made and sustained." (*Lona v. Citibank, N.A.*, *supra*, 202 Cal.App.4th at p. 101.) "If summary judgment was properly granted on any ground, we affirm 'regardless of the trial court's stated reasons.' " (*Abed*, at p. 739.)

2. The record is inadequate to fully evaluate Baker's claims.

The party seeking to challenge an order on appeal has the burden "to provide an adequate record to assess error." (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) Here, the documents that Baker filed in opposition to PNC's motion for summary judgment are not included in our record. In her November 2017 notice designating the appellate record, Baker listed "Plaintiff's Opposition to Motion for Summary Judgment" filed on August 28, 2017. But the only relevant document Baker filed on August 28 was a pocket brief opposing *Duke's* motion for summary judgment. Although Baker filed papers opposing PNC's motion, which collectively number nearly 200 pages, they were filed on August 24, not August 28. Those papers were therefore not included as part of the record as a result of Baker's designation.

The record was filed in this court on May 18, 2018, and a supplemental record was filed on June 12. On August 20, seven days before her opening brief was due, Baker filed a motion in this court to augment the record with the papers she filed in the trial court opposing PNC's motion for summary judgment. But even though she had access to those papers, having filed them below, she failed to include them with her motion to augment. Accordingly, we denied the motion for failure to comply with California Rules

of Court, rule 8.155(a)(2), without prejudice to her submission of another motion to augment that complied with the applicable rules. Baker never submitted such a motion, and we therefore do not have any of the materials she filed in the trial court to attempt to demonstrate triable issues of material fact. As a result, our ability to review Baker's claims of error is limited.

3. Summary judgment in PNC's favor was warranted.

a. Violations of the HBOR.

First, Baker claims that the trial court erred by summarily adjudicating her causes of action for violations of Civil Code sections 2923.55 and 2924.17, which are both part of the HBOR.[3] The HBOR, " 'effective January 1, 2013, was enacted "to ensure that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's servicer, such as loan modifications or other alternatives to foreclosure." ' " (*Schmidt v. Citibank, N.A.* (2018) 28 Cal.App.5th 1109, 1114–1115.) At the time of the relevant events in this case, under section 2923.55 a notice of default could not be recorded unless the mortgage servicer first sent certain information in writing to the borrower and "contact[ed] the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure," unless it could not contact the borrower despite the exercise of "due diligence." (Former § 2923.55, subds. (a)(1), (b)(1)-(2), (f).)[4] In turn, at all relevant times section 2924.17, subdivision (b) provided, "Before recording or filing [a notice of default], a mortgage servicer shall ensure that it has reviewed competent and reliable evidence to substantiate the borrower's default and the right to foreclose, including the borrower's loan status and loan information."

[3] All further statutory references are to the Civil Code.

[4] "Many sections of the HBOR were subject to a sunset provision, effective on January 1, 2018," including former section 2923.55. (*Schmidt v. Citibank, N.A.*, *supra*, 28 Cal.App.5th at p. 1115, fn. 4.)

Baker argues that PNC "failed to meet its initial burden [to show] that it complied with HBOR and discussed options and alternatives to foreclosure. The evidence overwhelming[ly] shows the opposite. PNC . . . foreclosed on Baker's home without contacting her and never provided a reasonable option to foreclosure." But she does not cite to or identify any of this evidence in connection with her argument. And her statement of facts is of no help either, as the only potentially relevant information she provides is supported by citations to allegations from the operative complaint and her declaration in opposition to PNC's motion, which is not in our record. We are " 'not required to search the record on [our] own seeking error,' " and " '[i]f a party fails to support an argument with the necessary citations to the record, . . . the argument [will be] deemed to have been waived.' " (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) Baker fails to demonstrate any error in the trial court's summary adjudication of her HBOR claims.

b. Negligence.

Next, Baker argues that the trial court erred by summarily adjudicating her negligence cause of action, based on its conclusion that PNC did not owe a duty to her. She claims that a duty did exist and there were triable issues of material fact about whether PNC breached it. Even if we were to assume that PNC had a duty to Baker, however, she fails to demonstrate any triable issues of material fact involving breach. She claims, again without any citations to the record, that "[t]he overwhelming evidence is that PNC mishandled her loan, failed to properly review her loan for modification[,] and failed to properly advise her of an escrow account and payoff option." And again, the only potentially relevant information she mentions in the statement of facts is either drawn from her complaint or evidence that is not in our record. Because Baker fails to relate her argument to any specific evidence in support of it, we also treat this claim as waived. (See *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.)

c. Remaining causes of action.

Finally, Baker contends that the trial court erred by summarily adjudicating her causes of action for wrongful foreclosure, cancellation of instruments, declaratory relief,

and quiet title, "because triable issues of material fact exist about PNC's substitution of QLS as trustee." Her argument rests on the theory that PNC, as the servicer, did not "have any beneficial interest in the loan and, therefore, could not lawfully substitute QLS as the trustee under the [deed of trust]." In turn, she claims, QLS did not have authority to record the notice of trustee's sale or to hold the sale. We conclude there was no error.

Baker relies on section 2934a, subdivision (a)(1), which provides: "The trustee under a trust deed upon real property . . . given to secure an obligation to pay money and conferring no other duties upon the trustee than those which are incidental to the exercise of the power of sale therein conferred, may be substituted by the recording in the county in which the property is located of a substitution executed and acknowledged by," as relevant here, "all of the beneficiaries under the trust deed, or their successors in interest." The substitution of trustee in this case was executed by "PNC Bank, National Association, successor by merger to National City Mortgage, a division of National City Bank," and recited that PNC Bank was "the present Beneficiary under [the] Deed of Trust."

Baker contends that "it was impossible for PNC, as the servicer of the loan, to have any beneficial interest in the loan and, therefore . . . [to] lawfully substitute in QLS as the trustee." Although it is undisputed that Fannie Mae was the beneficiary, it does not follow that PNC was unauthorized to execute and record a substitution of trustee. At least where, as here, the deed of trust is governed by California law and does not expressly provide otherwise, a substitution of trustee may be executed by an agent of the beneficiary, because "[i]n California, any action that may be done by a principal may also be done by the principal's agent unless the act specifically requires the principal's personal attention. (Civ. Code, § 2304.)" (*Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 39.) In turn, it is undisputed that PNC was the servicer, and a loan servicer is an agent of the beneficiary. (*Id.* at p. 46; § 2920.5, subd. (a).) Although Baker insists that under section 2934a *only* the beneficiary may execute a substitution of trustee, she cites no authority or any language in the deed of trust to suggest that the beneficiary's agent cannot be empowered to do the same, and we

" ' "refuse[] to read any additional requirements into the non-judicial foreclosure statute." ' " (*Kalnoki*, at p. 40.)

Moreover, even if QLS was not properly substituted as the trustee, Baker lacks standing to challenge the foreclosure on this basis. *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, the primary authority on which Baker relies, held "only that a borrower who has suffered a nonjudicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly void assignment [of the loan] merely because he or she was in default on the loan and was not a party to the challenged assignment." (*Id.* at p. 924.) Baker does not claim, however, that there was any void assignment of her loan such that Fannie Mae was not the beneficiary. Thus, *Yvanova* and other cases involving allegations that the party who initiated foreclosure proceedings lacked an interest in the property are inapposite.

Instead, Baker claims that QLS lacked authority to act on Fannie Mae's behalf because QLS was not actually substituted as the trustee. But even if the substitution was invalid, it does not follow that QLS lacked authority to participate in the foreclosure proceedings. Section 2924b permits not only the beneficiary or trustee but also "an agent for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed substitution of trustee, or an agent of that substituted trustee" to record a notice of sale. (§ 2924b, subd. (b)(4).) There has been no showing that QLS was unauthorized to act on Fannie Mae's behalf, and in any case, if any party was harmed by QLS's supposedly unauthorized actions, it was Fannie Mae. Baker provides no authority to support either the notion that she, as the borrower, has standing to complain about the agency relationship between the beneficiary and a party conducting foreclosure proceedings or the notion that any improper assertion of authority by QLS rendered the sale void, as opposed to merely voidable. Accordingly, the trial court did not err by granting summary judgment on her claims against PNC.

C. The Trial Court Properly Entered a Verdict in Duke's Favor.

Finally, Baker contends that the trial court erred by entering a verdict against her on her claims for cancellation of instruments and declaratory relief against Duke. We are not persuaded.

Although Baker claims that the trial court abused its discretion in ruling in favor of Duke, we agree with Duke that this standard of review applies only to Baker's challenge to the court's evidentiary rulings. (See *Park v. First American Title Co.* (2011) 201 Cal.App.4th 1418, 1427.) And although we usually review a trial court's factual findings after a bench trial for substantial evidence, " '[t]his test is typically implicated when a defendant contends that the plaintiff succeeded at trial in spite of insufficient evidence. In the case where the trier of fact has expressly or implicitly concluded that the party with the burden of proof' "—here, Baker—" 'did not carry the burden and that party appeals, . . . [¶] . . . the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law.' " (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465–466.)

The trial court found that Baker had "failed to show that the trustee sale was void, and more particularly, that there was a fraudulent substitution of trustee." In resisting this conclusion, Baker argues only that a PNC employee's testimony was "insufficient to establish that PNC had a beneficial interest in the loan and was authorized to substitute in QLS as the trustee under the [deed of trust]. As such, Duke had no contractual right to purchase the property as a result of the void trustee sale."[5] As explained above, however, the validity of the substitution of trustee does not hinge on whether PNC was the beneficiary. Baker identifies no evidence suggesting, much less compelling the

[5] Baker makes the cursory assertion that the trial court abused its discretion by sustaining Duke's objection to her asking this witness to explain how PNC had a beneficial interest in the loan. She fails to support this claim with any " ' "reasoned argument and citations to authority," ' " and we therefore treat it as waived. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)

conclusion, that PNC Bank was unauthorized to execute the substitution of trustee. As a result, she fails to provide us with any reason to overturn the court's verdict.[6]

III.
DISPOSITION

The trial court is directed to enter, nunc pro tunc as of September 15, 2017, a judgment in favor of PNC. That judgment and the judgment in favor of Duke are affirmed. PNC and Duke are awarded their costs on appeal.

[6] We agree with Duke that because the trial court did not find any irregularities in the foreclosure proceedings, there is no need to address Baker's arguments pertaining to whether Duke was a bona fide purchaser who was entitled to a conclusive presumption of compliance with statutory requirements. (See § 2924, subd. (c); *Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1250.)

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Humes, P.J.

WE CONCUR:

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Banke, J.

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Sanchez, J.